UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---X
UNITED STATES OF AMERICA,

ECF FILING

- against -

12 CR 707 (LAK)

LIN WU,
YING CHEN, et. al.

Defendants
--X

IN LIMINE MOTION
TO PRECLUDE EVIDENCE OF PRIOR BAD ACTS
AND UNCHARGED CRIMES

Dated: New York, New York
May 24, 2013

Donald Yannella, PC
Attorney for Defendant
YING CHEN
233 Broadway, Suite 2370
New York, NY 10279
(212) 226-2883
nynjcrimlawyer@gmail.com
Fax: (646) 430-8379

Ying Chen is charged in count one of the indictment with conspiracy to commit alien smuggling, 8 USC § 371 and 8 USC §1324 (a)(2)(B)(ii) . Although the time frame of that conspiracy is in or about 2010 through September 2012, the discovery suggests that Ms. Chen's involvement was limited to a series of conversations that she had with two confidential informants between August and October of 2010. She had no involvement in the other overt acts, such as exchanging money, exchanging travel documents, meeting with aliens, arranging transportation and hotel accommodations, or assisting in the smuggling. Her involvement ceased after those telephone calls occurred.

Although counts two and three of the indictment also relate to immigration fraud, Ms. Chen is not charged in those counts. Nor is she charged with narcotics or the other miscellaneous offenses in the indictment.

By letter dated May 14, 2013, the Government provided notice that they "may seek to introduce evidence at trial of other criminal activity by the defendant, either pursuant to Rule 404(b), Fed. R. Evid., as proof of the defendant's opportunity, intent, preparation, plan, knowledge, and absence of mistake or accident, or alternatively to complete the story of the charged offense. The evidence would consist of evidence of the other offenses discussed by Ying Chen in the conversations corresponding to the draft transcripts identified with control numbers LW 2453-2692."

The defense hereby moves to preclude the Government from introducing evidence of uncharged crimes and prior bad acts, including but not limited to evidence of distribution or use of narcotics, credit card fraud, unlawful distribution of cigarettes, and prior instances of alien smuggling.

Those draft transcripts involve numerous attempts by the Government's confidential informants to persuade Ying Chen to find Chinese customers for their alleged alien smuggling plot. Interspersed with those conversations are statements and inquiries by one of the confidential informants regarding uncharged crimes. For example, one of the confidential informants asks Ms. Chen for assistance in finding marijuana, "K," and ecstasy pills. This leads to discussions about the price, quality, and availability of various drugs, even though Ms. Chen never is involved in any narcotics transactions. Also, the confidential informant asks Ms. Chen for assistance in obtaining cigarettes, even though Ms. Chen is not involved in cigarette distribution and has no license to distribute cigarettes. Furthermore, a confidential informant makes references to Ms. Chen's alleged involvement in prior alien smuggling. Finally, a confidential informant makes references to Ms. Chen's involvement or knowledge of credit card fraud. None of the above activities are charged in the indictment.

Such evidence is not relevant, as defined in Rule 401. Therefore, it is inadmissible pursuant to Rule 402. Admitting such evidence might cause the jury to infer that Ms. Chen is predisposed to commit various crimes and that her actions in the instant case were committed in accordance with such bad character. That evidence is barred by FRE 404(b)(1).

Even if the above evidence were relevant, it is inadmissible under Rule 403 which says that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed.R.Evid. 403. "The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the fact finder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief v. United States*, 519 U.S. 172, 180 (1997). Evidence is considered prejudicial if it tends "unfairly to excite emotions against the defendant." *United States v. Figueroa*, 618 F.2d 934, 943 (2d Cir. 1980). In conducting the required Rule 403 balancing, the court should consider whether any evidentiary alternatives exist, which are similarly probative but less prejudicial to the defendant. *Old Chief*, 519 U.S. at 182–83; *see also United States v. McCallum*, 584 F.3d 471, 477 (2d Cir. 2009).

Certain portions of the draft transcripts are extremely prejudicial. For example, at one point the confidential informant asks Ying Chen the following questions:

Q: Have you been doing smuggling lately?

A: No.

Q: You don't do it anymore?

A: VO. UI.

Such portions of the draft transcripts should be precluded altogether. The confidential informant's words have no evidentiary value, especially where Ms. Chen's response to such an inflammatory accusation is unintelligible.

The jury should not be led to believe that Ms. Chen was recruited to commit the offense because she predisposed to commit crimes, because she previously had committed crimes, or because she knew certain criminals. Evidence is not admissible merely because it is background. Inflammatory and prejudicial evidence is inadmissible where its exclusion "would not have left any gaps in the Government's case, nor have left the jury wondering about the missing pieces." *United States v. Williams*, 585 F.3d 703, 708 (2d Cir. 2009) (the government should not be permitted to introduce into evidence "unsavory details which go beyond what is necessary to make the point"). As the Second Circuit observed in *Williams*, even if it might be circumstantially relevant, the amount of uncharged crimes evidence must not be "far beyond what was necessary." Admitting excessive uncharged crime evidence ignores a "common sense precaution which should clearly be taken ... to limit the prosecutor's presentation to such facts ... as are reasonably necessary to prove the point for which the evidence is admitted, and to exclude unsavory details which go beyond what is necessary to make the point." *Id.*, *citing*, David W. Louisell & Christopher B. Mueller, Federal Evidence § 140, at 209 (rev. ed. 1985).

Where the "other-act" evidence is inflammatory, a court must carefully consider whether it will be used by only in connection with the proper purpose for which it was admitted, or whether instead it is likely to be misused. *Curley*, at 56 (reversing conviction where district court abused its discretion by admitting evidence that the defendant's brother had previously intimidated the victim). Evidence is also unfairly prejudicial when "it tends to have some adverse effect upon a defendant beyond tending to prove the fact or issue that justified its admission into evidence." *United States v. Massino*, 546 F.3d 123, 132 (2d Cir. 2008) (internal quotation marks omitted). If the other acts tend to prove a fact not in issue or "to excite emotions against the defendant," they create a prejudicial effect. *Figueroa*, at 943. A district court abuses its discretion when it admits "other act" evidence with a high possibility of jury misuse but with only slightly more probative value than other evidence on the same issue. *See McCallum*, 584 F.3d at 477 (finding that "we are at a loss to understand how the court or the government could believe that the prior convictions were necessary to prove McCallum's intent and knowledge and that they passed muster under Rule 403").

Even though the Second Circuit embraces the so-called inclusionary approach to admitting evidence of other bad acts and uncharged crimes, district courts should not presume that such evidence is relevant or admissible. *Curley*, at 56. If uncharged crimes are offered by the prosecution for a particular inference, the court must consider all the evidence presented to the jury and determine whether a reasonable jury could find the advocated inference. *Id.* at 56. The court abuses its discretion if the evidence is "not sufficiently similar" to the charged conduct or if "the chain of inferences necessary to connect [the] evidence with the ultimate fact to be proved [is] unduly long." *Id., citing United States v. Peterson*, 808 F.2d 969, 974 (2d Cir. 1987).

CONCLUSION

For the reasons stated above, the Court should preclude the Government from introducing evidence of prior bad acts and uncharged crimes.

Dated: May 24, 2013

Respectfully submitted,

/s/

Donald Yannella, Esq.

Declaration of Service

Donald Yannella, an attorney duly admitted to practice law in the United States District Court, Southern and Eastern Districts of New York, pursuant to 28 U.S.C. § 1746, declares under penalty of perjury that the following is true and correct:

Today, I served a copy of the attached motion and memorandum of law upon the following individuals via ECF:

AUSA Jennifer Burns
AUSA Paul M. Monteleoni

Dated: May 24, 2013

/s/
____
Donald J. Yannella, Esq.